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**MAILED**

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OFFICE OF PETITIONS

In re Patent No. 6,049,910  
Issue Date: April 18, 2000  
Application No. 09/294,528  
Filed: April 19, 1999  
Title: Athletic Training Glove

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DECISION ON PETITION

This is a decision on the renewed petition to accept the unavoidably delayed payment of the maintenance fee under 37 CFR 1.378(b), filed June 10, 2011.

The petition is **GRANTED**.

The above-identified patent issued on April 18, 2000. Therefore, the window for paying the second maintenance fee extended from April 18, 2007 to October 18, 2007 without surcharge, and from October 19, 2007 to April 18, 2008, with surcharge. No maintenance fee and surcharge having been received in full on or before April 18, 2008, the patent expired on April 19, 2008. Patentee filed a petition under 37 CFR 1.377 on June 8, 2008, explaining that he did timely file the maintenance fee on April 16, 2008, but that it was \$30 deficient. The petition was dismissed in a decision mailed on March 20, 2009, explaining that patentee did not submit the \$200 fee required for the petition, and also explaining that a petition under 37 CFR 1.377 would need to demonstrated that the maintenance fee was timely paid in full. The two year deadline for filing a petition to accept the unintentionally delayed payment of the maintenance fee expired on April 18, 2010. Patentee filed a letter on April 15, 2010,

requesting a "grace period" to allow him to file a petition to accept the unintentionally delayed payment of the maintenance fee beyond two years after expiration. However, as the two year deadline is set by statute, it can not be waived. Accordingly, patentee's request was dismissed in a decision mailed on July 19, 2010. Patentee filed a petition to accept the unavoidably delayed payment of the maintenance fee on February 28, 2011, asserting that he did not have the money to timely pay the maintenance fee. However, this petition was dismissed in a decision mailed on April 13, 2011.

### Relevant Statutes and Regulations

35 U.S.C. § 41(c)(1) states that:

The Commissioner may accept the delayed payment of any maintenance fee required ... after the six month grace period if the delay is shown to the satisfaction of the Commissioner to have been unavoidable.

37 CFR 1.378(b) provides that:

Any petition to accept an unavoidably delayed payment of a maintenance fee must include:

- (1) The required maintenance fee set forth in §1.20(e) through (g);
- (2) The surcharge set forth in §1.20(i)(1); and
- (3) A showing that the delay was unavoidable since reasonable care was taken to ensure that the maintenance fee would be paid timely and that the petition was filed promptly after the patentee was notified of, or otherwise became aware of, the expiration of the patent. The showing must enumerate the steps taken to ensure timely payment of the maintenance fee, the date and the manner in which patentee became aware of the expiration of the patent, and the steps taken to file the petition promptly.

§ 1.378(b)(3) is at issue in this case. Acceptance of a late maintenance fee under the unavoidable delay standard is considered under the same standard for reviving an abandoned application under 35 U.S.C. § 133. This is a very stringent standard. Decisions on reviving abandoned applications on the basis of "unavoidable" delay have adopted the reasonably prudent person standard in determining if the delay was unavoidable:

The word 'unavoidable' ... is applicable to ordinary human affairs, and requires no more or greater care or diligence than is generally used and observed by prudent and careful men in relation to their most important business. In addition, decisions are made on a "case-by-case basis, taking all the facts and circumstances into account." Smith, 671 F.2d at 538, 213 U.S.P.Q. at 982. Nonetheless, a petition cannot be granted where a petitioner has failed to meet his or her burden of establishing that the delay was "unavoidable." Haines, 673 F. Supp. at 316-17, 5 U.S.P.Q.2d at 1131-32 (N.D. Ind. 1987).

Moreover, delay resulting from the lack of knowledge or improper application of the patent statutes, rules of practice or the Manual of Patent Examining Procedure, however, does not constitute "unavoidable" delay.

#### **Renewed Petition**

On renewed petition, petitioner now states that at the time he submitted the incorrect amount due for the maintenance fee on April 16, 2008, he was "not in a normal state of mind" because of his medical condition at the time. As such, petitioner asserts that was the reason he only submitted \$1,180 for the maintenance fee, when \$1210 was in fact due.

In support thereof, petitioner has supplied a letter from his treating physician, Gerald A.M. Finerman, MD. Dr. Finerman states that McCarter has had multiple orthopaedic surgeries since 2008, during which time he was taking strong narcotic medication for pain control. In addition, Dr. Finerman states that "[d]uring the time of his recovery, his decision making and reasoning may have been impaired."

#### **Conclusion**

The evidence submitted on renewed petition has been considered, and found to be persuasive.

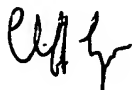
The instant patent is hereby reinstated as of the mailing date of this decision.

Patentee is reminded that the one year window for payment of the twelve year maintenance fee (currently \$2,365) opened on April 18, 2011, and closes on April 18, 2012. Payment of the maintenance fee from October 19, 2011 to April 18, 2012 will also require payment of the "late payment within 6 month" surcharge (currently \$75).

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Telephone inquiries concerning this communication should be directed to the undersigned at 571-272-3207.

A handwritten signature in black ink, appearing to read 'Cliff Congo', written in a cursive style.

Cliff Congo  
Petitions Attorney  
Office of Petitions